

## **WRITING VA MEDIATION SETTLEMENT AGREEMENTS**

Once the parties have reached an agreement it is important to reduce that agreement to writing. It is the job of the mediator to act as a scribe and to use the words of the parties, not his/her own. The parties are responsible for the substance of the agreement and the final product must reflect their thinking, not the mediator's. A properly drafted settlement agreement serves three important purposes. First, from a procedural aspect, everyone participates in the drafting of the terms of the agreement. Second, from a psychological aspect, everyone's participation in its drafting ensures that each has had an opportunity to be heard. Finally, there will be substantive satisfaction with the terms of the agreement when everyone participates in its drafting. Making the drafting a collaborative effort enhances the likelihood the parties feel they "own" the agreement. This leads to a greater likelihood that the parties will abide by the agreement.

The written settlement should reflect the agreement of the parties as to how they will relate to one another in the future. It should describe in detail the responsibilities each party has agreed to assume in order to resolve their dispute. It is, therefore, important that the agreement be understandable, comprehensive and specific. Upon reading the agreement, it should be clear who will do what, when, how, and how much. While the mediator generally writes the agreement, it is the parties' agreement and it is their solution to their problem. The mediator can, however, help the parties review the substantive areas of the agreement to prevent later confusion.

In drafting the settlement agreement, mediators should be mindful that the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, specifically excludes a final written agreement reached as a result of a mediation from the confidentiality provisions of the Act. (Written agreements to mediate are also not protected from release by the Act.) (See 5 U.S.C. § 571 (5).) Thus, the agreement to mediate and the settlement agreement can be obtained by a requestor through the Freedom of Information Act, even if the parties otherwise agree to keep those documents confidential. It should be noted that in releasing these documents in response to a FOIA request, the names and other identifying information may be withheld in order to avoid an unwarranted invasion of personal privacy. (See 5 U.S.C. § 552(b)(6).) In drafting a settlement agreement, a mediator can take steps to limit the amount of information that is disclosed. By carefully tailoring the background of the dispute and limiting fact descriptions to case numbers and/or general references, concerns about the release of confidential information can be minimized.

### **Suggested Settlement Agreement Provisions**

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| 1. The opening paragraph should give the date the mediation occurred and identify the parties to the mediation                                     | The terms of this settlement agreement were voluntarily arrived at through mediation conducted on June 1, 2000, involving John Jones and Mary Smith.  |
| 2. If a complaint or a grievance has been filed, the settlement agreement should specifically state that the complaint or grievance is withdrawn.* | John Jones agrees, upon execution of this settlement agreement, to withdraw, in its entirety, his complaint of discrimination (Complaint No. _____) on the basis of (race, sex, age, etc.) filed on (date). |

\*This guidance is from a September 8, 1999, memorandum from the Deputy Assistant Secretary for Resolution Management to the Chief Network Officer, Veterans Health Administration.

3. There should be an acknowledgement that by entering into the settlement agreement the complainant or grievant waives his/her right to further processing of the complaint or grievance and the right to file any civil action in connection with the complaint or grievance.\*

By entering in this settlement agreement, Mr. Jones waives all further remedies, all rights to further administrative processing and all rights to file a civil action in connection with this complaint of discrimination (or grievance).

4. If the dispute being settled has not given rise to a formal complaint or grievance, the party raising the issue should agree not to use the circumstances leading to the dispute as a basis for a subsequent formal complaint or grievance.

Ms. Smith and Mr. Jones agree not to use the facts of the dispute leading to this settlement agreement as a basis for a subsequent formal grievance or complaint.

5. The agreement should clearly state that by entering into it there is no admission of fault, liability or wrongdoing on the part or either party.

Mr. Jones and Ms. Smith agree that this settlement agreement does not constitute an admission of guilt, fault, or liability on the part of either Mr. Jones or Ms. Smith.

6. Include a statement concerning the non-precedential effect of the settlement.

The terms of this agreement will not establish any precedent, nor will the agreement be used as a basis by Mr. Jones, Ms. Smith or any representative organization to seek or justify similar terms in any civil action or subsequent case.

7. The agreement should note that the terms written out in the agreement constitute the total agreement, and that any other promises, commitments, etc., not contained in the agreement are not binding.

Ms. Smith and Mr. Jones agree that this agreement constitutes the entire agreement and there are no other terms to the agreement except those specified herein. They further agree that this agreement may not be modified except by a writing executed by all of the parties to this agreement.

8. The agreement should contain some encouragement for utilizing mediation if either party believes that the settlement agreement has been breached or that the other party has not complied with the terms of the agreement. This is not mandatory, however.

Should either party believe that this agreement has been breached, Mr. Jones and Ms. Smith agree to attempt to resolve the matter through mediation.

\*This guidance is from a September 8, 1999, memorandum from the Deputy Assistant Secretary for Resolution Management to the Chief Network Officer, Veterans Health Administration.

9. Agreements settling EEO complaints must include the EEO case number(s) and a specific statement of withdrawal of the EEO complaint. It must also contain a statement of the employee's rights in the event of an alleged breach.\*

Mr. Jones acknowledges that if he believes VA has not complied with the terms of this Settlement, he may notify the Deputy Assistant Secretary for Resolution Management, in writing, within 30 days of the alleged violation requesting that the terms of this settlement agreement be specifically implemented. Alternatively, he may request that EEO complaint number \_\_\_\_ be reinstated for further processing from the point processing ceased. Thereafter, Mr. Jones may appeal to the Equal Employment Opportunity Commission pursuant to 29 C.F.R § 1614.540 if he believes that VA has either not fully implemented this settlement agreement or improperly failed to reinstate the complaint.

10. If the agreements relates to a complaint of discrimination based upon age, it must: be clearly written from the viewpoint of the complainant; specifically refer to rights under the Age Discrimination in Employment Act; state the complainant does not waive rights or claims which arise following the execution of the waiver; advise the complainant to consult with an attorney prior to signing the agreement; and give the complainant a reasonable period of time in which to consider the agreement.\*

Mr. Jones and Ms. Smith specifically acknowledge that Mr. Jones has preserved the following rights and responsibilities through the execution of this agreement:

- a. Mr. Jones has thoroughly reviewed the entire agreement and understands its provisions.
- b. Mr. Jones has not waived any rights or claims that may arise after the date this agreement is signed.
- c. Mr. Jones has the right to consult with an attorney prior to signing this agreement.
- d. Mr. Jones has had a period of twenty-one days to consider this agreement.
- e. Mr. Jones will have seven days following the execution of this agreement to revoke the agreement and the agreement will not become effective or enforceable until the seven day revocation period has passed.

11. In the event that the Agency is a party, whoever signs the agreement should clearly indicate it is signed on behalf of the agency and not in his or her personal capacity.

Department of Veterans Affairs

By: \_\_\_\_\_  
Mary Smith  
Medical Center Director

\*This guidance is from a September 8, 1999, memorandum from the Deputy Assistant Secretary for Resolution Management to the Chief Network Officer, Veterans Health Administration.

Here are some additional points to keep in mind when drafting an agreement.

1. Use plain English

Avoid the use of acronyms or jargon.

Keep the sentences simple and short.

Avoid ambiguous words such as “reasonable,” “soon,” or “practicable.”

**Wrong:** Mr. Jones agrees to forward Form 1090 to HRM as soon as practicable.

**Right:** Mr. Jones agrees to provide Form 1090, Application for Retirement, to the Office of Human Resources, VA Central Office, by the close of business, October 1, 2000.

2. Refer to the parties by name, not status.

**Wrong:** The claimant and the respondent agree to this settlement.

**Right:** John Jones and Mary Smith agree to this settlement.

3. Be specific as to when things should happen; clearly state all times and deadlines.

**Wrong:** John Jones agrees he will provide reasonable notice of his requirements.

**Right:** By October 1, 2000, John Jones will give to Mary Smith a list of those items he needs to complete the work project identified as the Brown proposal dated June 30, 2000.

4. Be balanced.

The agreement should reflect each party’s contribution to the full resolution. Try to avoid the appearance that one side is doing all the compromising. One way to do this is to state what John has agreed to do and that Mary has agreed to accept that action as fulfilling her expectations. Another way to do this is to list the agreed upon actions in an alternating format

**Wrong:** John Jones agrees to provide written notice to Mary Smith. He also agrees to complete the work by October 1, 2000.

**Right:** John Jones agrees to provide written notice to Mary Smith by August 1, 2000. Mary Smith agrees to this form and date of notice.

John Jones agrees to complete the work by October 1, 2000.

Mary Smith agrees that the date of October 1, 2000, for completion of the work is acceptable.

5. Avoid assessing blame.

Use non-judgmental wording. Remember, mediation is not about who was at fault but rather what can be done to foster an effective on-going future relationship.

**Wrong:** Mr. Jones' failure to respond resulted in Ms. Smith incurring significant damage to her work space. Accordingly, he agrees to be more prompt in the future.

**Right:** Mr. Jones agrees that he will respond to Ms. Smith within twenty-four hours of receiving her request for service. Ms. Smith agrees that is acceptable to her.

6. Spell out an agreed upon procedure for handling future disagreements.

The parties have already successfully used mediation as a tool for resolving their dispute. Differences may occur as the parties try to carry out their agreement. It is useful to provide for an agreed upon mechanism for addressing these differences as they arise.

**Wrong:** The agreement is silent about how the parties will resolve any future disputes.

**Right:** If a dispute arises out of or relates to this agreement, Mr. Jones and Ms. Smith agree to try to resolve that dispute utilizing mediation before resorting to any other remedy.

### ***SAMPLE AGREEMENT***

1. The terms of this settlement agreement were voluntarily arrived at through mediation conducted on July 1, 2000, involving John Jones and Mary Smith.
2. Ms. Smith and Mr. Jones agree that this settlement agreement does not constitute an admission of guilt, fault, or liability on the part of either Mr. Jones or Ms. Smith.
3. By entering into this settlement agreement, Mr. Jones agrees to withdraw in its entirety, his complaint of discrimination (Complaint No. 2000-54) on the basis of sex and age filed on May 10, 2000.
4. Ms. Smith agrees to withdraw the Performance Improvement Plan dated May 1, 2000, which was presented to Mr. Jones on that date.
5. Mr. Jones agrees to identify a course of training in Microsoft Office systems which he will pursue, the exact course and the date(s) to be determined by no later than July 30, 2000. The date for completion of the course will be not later than December 30, 2000.
6. Ms. Smith agrees to give Mr. Jones until July 30, 2000, to identify the course of training and the training dates.
7. Ms. Smith agrees to provide the funding to cover the tuition costs and local travel costs incurred by Mr. Jones as a consequence of his taking the agreed upon course.
8. Mr. Jones agrees to furnish Ms. Smith with certification provided by the trainer of satisfactory completion of the course within 15 working days of the completion of the course.

9. Ms. Smith agrees to accept as evidence of satisfactory completion of the course certification provided by the trainer.
10. Mr. Jones acknowledges that if he believes VA has not complied with the terms of this Settlement, he may notify the Deputy Assistant Secretary for Resolution Management, in writing, within 30 days of the alleged violation requesting that the terms of this settlement agreement be specifically implemented. Alternatively, he may request that EEO complaint number 2000-54 be reinstated for further processing from the point processing ceased. Thereafter, Mr. Jones may appeal to the Equal Employment Opportunity Commission pursuant to 29 C.F.R § 1614.540 if he believes that VA has either not fully implemented this settlement agreement or improperly failed to reinstate the complaint.
11. Mr. Jones and Ms. Smith specifically acknowledge that Mr. Jones has preserved the following rights and responsibilities through the execution of this agreement:
  - a. Mr. Jones has thoroughly reviewed the entire agreement and understands its provisions.
  - b. Mr. Jones has not waived any rights or claims that may arise after the date this agreement is signed.
  - c. Mr. Jones has the right to consult with an attorney prior to signing this agreement.
  - d. Mr. Jones has had a period of twenty-one days to consider this agreement.
  - e. Mr. Jones will have seven days following the execution of this agreement to revoke the agreement and the agreement will not become effective or enforceable until the seven day revocation period has passed.
12. If a dispute arises out of or relating to this agreement, Mr. Jones and Ms. Smith agree to submit the matter to mediation prior to reinstating the complaint.
13. The terms of this agreement will not establish any precedent, nor will the agreement be used as a basis by Mr. Jones, Ms. Smith or any representative organization to seek or justify similar terms in any civil action or subsequent case.
14. Ms. Smith and Mr. Jones agree that this agreement constitutes the entire agreement and there are no other terms to the agreement except those specified herein. They further agree that this agreement may not be modified except by a writing executed by all of the parties to this agreement.
15. Ms. Smith and Mr. Jones agree not to subpoena the mediator(s) nor any documents prepared by or for the mediator(s). Ms. Smith and Mr. Jones further agree not to request the mediator(s) to voluntarily testify on their behalf or to request the mediator(s) to submit any type of report in connection with this mediation.

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John Jones

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Date

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Mary Smith

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Date

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Union Representative (if appropriate)

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Date

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Mediator

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Date

